

The Tenth Justice? Consequences of Politicization in the Solicitor General's Office

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ABSTRACT

**Patrick C. Wohlfarth: The Tenth Justice? Consequences of Politicization in the
Solicitor General's Office
(Under the direction of Kevin T. McGuire)**

Previous analyses of the solicitor general's influence on the Supreme Court emphasize one of three explanations: expertise, an independent agent, or an ideological signal. Overall, the solicitor general is widely considered to serve two masters, both the President and Court. This creates an inherent tension between duties as a political advocate and independent legal agent. I propose a theory attempting to explain the interaction between these two roles. I argue that the political advocacy of the solicitor general has a direct impact on this independent status and success. I test my assertion using time series data from 1953-1985 and an individual-level analysis spanning the 1953-1993 Court terms. My results show a relationship between politicization and solicitor general success conditioned by the party supported in *amici*, the historical time period under investigation, and political issue salience. The data suggest a solicitor general-Court relationship dependent on the context surrounding litigation.

To Mom

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Few people outside of the legal and academic communities are familiar with the role of the solicitor general (S.G.) in American politics. Yet the United States' principal voice and chief litigator on the Supreme Court is critical to the operation of our governmental system of shared powers. The solicitor general, as the executive branch's official agent to the Supreme Court, is perhaps the most important influence on Court decisions, beyond the justices themselves. While officially a presidential appointee and member of the Justice Department, the S.G. is widely regarded as the independent bridge connecting the executive branch to the Court. As a result, Court observers view the S.G. as an informational tool the justices utilize throughout the decision-making process. Perry (1991) claims that the solicitor general, on many cases at the agenda setting stage, functions as a "surrogate of the Court" in assessing the merit for granting *certiorari*. This unique status affords the solicitor general unmatched success when seeking justices' support for legal positions (McGuire 1998; Caplan 1987; Salokar 1992; Segal 1988; Scigliano 1971; Caldeira and Wright 1988; O'Connor 1983). In fact, the S.G.'s success on the merits as a litigant and *amicus curiae*, and the deference commonly received from the Court, is so well established that the solicitor general is often referred to as the "Tenth Justice" (Caplan 1987).

Scholars have offered several explanations for the S.G.'s overall success, including the S.G. as an agent of the Court, a frequent litigant, and an ideological signal. According to previous accounts, the S.G. as a surrogate of the Court occupies this prominent position due to an expected independence and impartiality (Caplan 1987; Pacelle 2002; Scigliano 1971; Puro 1981). Similarly, the S.G.'s legal expertise and experience working with the Court

establishes the position as a classic “repeat player” (Galanter 1974; McGuire 1998; Segal 1988; Caldeira and Wright 1988; Spriggs and Wahlbeck 1997). From a political perspective, scholars have demonstrated that ideological proximity to individual justices increases the probability of success as *amicus curiae* (Bailey et al. 2005). Underscoring all of the empirical and theoretical foundations is the solicitor general’s perceived dual obligation to both the executive branch and the Court. Implicitly, a tension may exist between the S.G.’s responsibility to serve the informational needs of those on the bench while at the same time advocating the President’s agenda. If the solicitor general exhibits excessive political advocacy, it will likely jeopardize the justices’ faith that the legal information supplied is impartial. Prevailing empirical accounts of S.G. success have not fully explored the relationship between these two roles, instead emphasizing the solicitor general as a political or independent actor, largely irrespective of the other. If the S.G. does serve the needs of both the Court and President, with the former representing the independent role and the latter as political, then one would expect success to vary depending on the politicization of the solicitor general’s office.

This research paper examines the effects of the solicitor general’s political advocacy on the success rate as *amicus curiae*. In my view, if justices receive a general sense that the S.G. is being overly political in representing the President, then they should be less likely to trust the information being provided and thus not adopt the positions advocated by the S.G. From a principal-agent perspective, what are the consequences for a S.G. who shirks and does not respect the legal interests of the Court, but instead faithfully commits to the President’s agenda? After controlling for the ideological orientation of the justices, a negative relationship between solicitor general politicization and success would seem to

indicate that the Court does indeed view the S.G. appropriately as an independent actor. Likewise, I contend that the S.G. is an independent agent of the Court whose political activity has a direct bearing on legal influence. This is not to say that the S.G. is apolitical, rather excessive political activity will endanger the solicitor general's unique status in the eyes of Court members and neutralize the advantages as an experienced lawyer. I employ a time series regression for Court terms 1953-1985 and an individual-level analysis of all solicitor general *amici* between 1953 and 1993. The results reveal a relationship between success and politicization conditioned by the S.G.'s status as a petitioner versus a respondent, as well as the historical era under investigation and political issue salience.

Solicitor General Success and the Repeat Player

The notion of the solicitor general as the most influential and successful actor external to the Court is well-established. Frequently contributing during many different phases of the judicial process, the S.G. serves as the primary attorney when the government is a litigant while also reserving the discretion to file *amicus* briefs at both the merits and *certiorari* stages when the U.S. is not an official party. Scholars have demonstrated that the solicitor general's legal positions are overwhelmingly supported on the merits compared to all other participants, both as a direct litigant for the government and as *amicus curiae* (Segal 1988; McGuire 1998; Salokar 1992; Perry 1991; Segal and Reedy 1988; Caplan 1987; Puro 1981). According to Segal (1988), each solicitor general between 1953 and 1982 experienced support for merits-stage *amici* positions at least 65 percent of the time, a level unmatched by any other repeat contributor. Solicitor general Cox received the most support

for his positions, leading to an 88-percent success rate (Segal 1988). In addition, official Court opinions disproportionately implement the information and legal justifications supplied by S.G. *amici* compared to all other briefs (Spriggs and Wahlbeck 1997). Overall, judicial scholars have firmly established the S.G.'s consistent influence over much of Supreme Court activity as the primary supervisor of federal litigation.

As the most frequent contributor in Supreme Court cases, the S.G.'s success at the merits and *certiorari* stages may be partly attributed to the numerous opportunities to gain support for legal positions. One primary explanation is rooted in expertise and recurrent opportunities to appear before the Court. This is the classic perception of the S.G. as the quintessential "repeat player" (Galanter 1974; McGuire 1998; Perry 1991; Segal 1988; Caldeira and Wright 1988; Spriggs and Wahlbeck 1997). The S.G. as a "repeat player" utilizes a lofty reputation as an elite lawyer and a familiarity in delivering arguments before the Court to maintain such a unique status. Expertise and the frequency with which the S.G. delivers an oral or written argument are the central tenets of this theory. This advantage afforded to the "repeat player" extends to standard tasks such as crafting effective briefs and delivering cogent arguments. The S.G. is successful because the office-holder possesses the most intimate knowledge of Court procedures and the justices themselves. McGuire (1998) presents systematic evidence that the solicitor general's single advantage over every other external actor is "command of litigation expertise," not a supposed deferential status afforded by the justices. Likewise, the presence of more experienced lawyers before the Supreme Court substantially improves the probability of a litigant's success on the merits (McGuire 1995). As a result, it is reasonable to argue that the solicitor general's relative legal skills provide the necessary tools to achieve such disproportionate success. As Galanter (1974, 98)

so aptly describes, “repeat players” maintain an advantage over all other litigators because they, “...having done it before, have advance intelligence; they are able to structure the next transaction and build a record. It is the [repeat player] who writes the form contract, requires the security deposit, and the like.”

The Solicitor General as an Independent Agent of the Court

Much of the scholarly attention concerning the solicitor general’s influence is devoted to the idea that the S.G. considers the Court’s best interests when advocating legal positions. Conventional explanations associated with this theory posit that the S.G. acts not only as an agent of the President but also an agent of the Court (Caplan 1987; Pacelle 2003; Salokar 1992; Segal 1988; Caldeira and Wright 1988; Puro 1981; Scigliano 1971). Similarly, Jacob (1981) asserts that the solicitor general has traditionally remained independent of the Attorney General and the Justice Department’s strict partisan agenda. The focus of this argument emphasizes a deferential interplay between the S.G. and the justices. On one hand, the Court’s crowded docket creates substantial transaction costs if the justices act alone in acquiring the legal information necessary for reasoned judgment. Therefore, the justices are often in need of credible assistance from an outside source to aid in their decision making. The S.G. can fulfill this need through *amici*, whether invited or not, and litigant briefs. Alternatively, the S.G. is afforded a unique status by the Court because he or she customarily respects the best legal interests of the justices and not solely the partisan interests of the executive. In essence, the solicitor general is expected to remain unbiased and argue within a legal framework (Pacelle 2002). The S.G. maintains this credibility by providing impartial

information and filing *amici* only in cases of great legal importance or merit (Puro 1981).

Former solicitor general Days III claims that the S.G.'s duty before the Court is to "...insist that justice be done even where the immediate interests of the federal government may not appear to benefit" (Days III 1994, 488).

Overall, the theoretical crux of this explanation suggests that the S.G.'s success is directly related to a deferential status on the Court, one which results from attention to the justices' best legal interests. Caplan (1987, 4) provides an effective illustration of the respect paid to the Court by the solicitor general, claiming that the S.G. must "look beyond the government's narrow interests...and pay close attention to [a] case's impact on the law." As a result, this theory places the S.G. as a servant of those on the bench. However, these theoretical accounts of the solicitor general's prominence stress an apolitical outlook. More specifically, they neglect the fact that the S.G. is indeed a presidential appointee and therefore is likely a political actor. In addition, research suggests that Supreme Court justices make decisions based primarily on their personal policy preferences, otherwise known as the attitudinal model (Segal and Spaeth 2002). As a result, further investigation is needed to evaluate how the S.G.'s political activity might affect this unique status and success.

The Solicitor General as a Political Actor

Unlike the purely legal orientation of the S.G. as an agent of the Court and "repeat player," some scholars have examined the S.G.'s success as a function of ideological orientation. A political perspective of Supreme Court policy output naturally proceeds from the attitudinal model (Segal and Spaeth 2002). Therefore, explaining solicitor general

success using this line of reasoning emphasizes the ideological proximity between the S.G. and the justices. Pacelle (2003) and Segal (1988) suggest that the S.G.'s involvement with the Court does indeed have a political dimension. More specifically, Segal (1988, 142) argues that Supreme Court Justices must "condition their support for the solicitor general on the ideological direction of the brief." Bailey et al. (2005) provide systematic empirical evidence supporting a political theory of S.G. success by demonstrating that the solicitor general's *amici* send ideological signals that influence decision-making in civil liberties cases. They contend that a justice is more likely to accept the information provided, and thus support the S.G.'s position, as ideological proximity decreases, or when the S.G. sends a signal contrary to his or her predisposition.

Similar to the ideological interaction with the justices, judicial activism within the executive branch also signifies political advocacy. Often, direct orders originate from the President regarding specific issues important to the executive branch's agenda (Days III 1994). Pacelle (2003) and Salokar (1992) note that the solicitor general's office was frequently utilized by Reagan and H.W. Bush as a political extension of the administration in attempts to overturn *Roe v. Wade*. Other accounts of this political interaction indicate that the S.G.'s office has become increasingly activist over time, which is evident in the sheer number of *amici* landing on the justices' desks over the last 25 years (Cooper 1990; Deen et al. 2003). Not only has the frequency of *amici* participation increased dramatically, but some observers claim the S.G. is now more likely to file briefs involving a weak legal or governmental interest (Cooper 1990). Furthermore, the S.G.'s *amici* are often responsive to the ideological preferences of the President (Meinhold and Shull 1998). Succinctly stated,

according to some scholars the S.G. is a political representative of the President, and “the ‘Tenth Justice’ is no less political than the other nine” (Bailey et al. 2005, 83).

Conventional wisdom regarding the historical evolution of the solicitor general’s office claims the S.G. was utilized increasingly as a political tool during the Reagan Administration. Many scholars have used anecdotal and descriptive evidence to illustrate Reagan’s proclivity to exploit the S.G. in advancing his own political agenda (Salokar 1992; Caplan 1987; Pacelle 2003; Deen et al. 2003). As *amicus curiae*, Reagan’s solicitors general were especially active in advocating the President’s conservative agenda on individual-rights cases (Deen et al. 2003). Salokar (1992, 76) notes the administration “coined a new term in the language of the solicitor general’s office, ‘agenda cases’.” Caplan (1987) claims the Reagan Administration used its 1980 electoral mandate to push its social agenda through the Court. Overall, the idea that Reagan utilized the Justice Department, including the S.G., so that conservative justices on the Court could enact judgments consistent with his political agenda reinforces the broader conception of the solicitor general as an important political actor. Reagan’s “agenda cases” are clear examples of how the S.G.-President relationship is, or at once was, one of great political significance. Despite this, empirical analyses of the solicitor general’s political role on the Supreme Court neglect consolidating this with the office’s perceived neutrality. If ideological proximity and political activity predict the probability of winning on the merits, then what are the implications for an impartial legal-minded solicitor general?

Independent Agent vs. Political Lieutenant: An Extended Theory

Existing explanations for the S.G.'s overwhelming success as a litigant and *amicus curiae* — the S.G. as a “repeat player,” an agent of the Court, and an ideological signal — focus largely on one individual theory with little consideration of broader implications or alternative explanations. However, a rub exists between the solicitor general's two roles. While officially a presidential appointee and advocate of executive policies, the S.G. is also considered by many to be an independent agent who advances the proper legal interests of the Court. Duties as a political actor may naturally conflict with those of an impartial Court associate. How do these two roles interact? Assuming the S.G. serves both purposes, what are the implications of political advocacy for the office's unique, independent status? Prevailing evidence fostering this implicit tension should encourage a subsequent examination of the factors influencing S.G. success on the merits.

I contend that political advocacy by the solicitor general's office should have a direct impact on the S.G.'s success rate. If members of the Supreme Court view the office as an impartial source of legal information, then justices' evaluation of such messages should change as they sense the solicitor general acting with ulterior political motives. Likewise, a general perception that the S.G. is facilitating the President's agenda will indicate to the Court that the office is being politicized, and therefore the S.G.'s credibility should suffer. Excessive political advocacy diminishes the office's perceived independence, thereby compromising the advantages associated with the S.G.'s unique status and litigation experience. As a result, the solicitor general's success should decrease as the office becomes more politicized. If no relationship appears, then perhaps ideological proximity and the

political role is in fact the primary explanation for the S.G.'s disproportionate influence. A Supreme Court Justice who purportedly values impartial legal assistance should not continue to support the source of such aid if it advocates a biased political agenda.

The relationship between the Court and solicitor general can be viewed through a principal-agent framework. The classic notion of a principal-agent relationship, originating in economics, involves several features: a) the agent has a choice between two alternatives; b) the choice made by the agent affects the welfare of both the agent and principal; and c) the principal can react to the agent's choice through reward or punishment (Moe 1984; Arrow 1986).¹ The S.G. applied to this context reflects an agent with competing principals. A solicitor general with a dual responsibility to both the President and Court must consider the interests of each separate principal. As a political representative of the executive, the S.G. advocates administration policies and functions as an ideological extension of the President. Yet, assuming the solicitor general operates as an independent actor cognizant of the justice's legal needs, the S.G. is also an agent to the Court and assumes a subservient role in providing unbiased information. Therefore, the solicitor general as an agent with competing principals must appeal to the interests of two different masters. The S.G. may remain independent and furnish the impartial legal opinions the Court desires, or attempt to balance this with the executive's ideological or partisan agenda. Justices most likely realize that the S.G. is a presidential appointee and allow for some discretionary action to support the President, or shirking. Advocating the President's partisan agenda through political advocacy in *amici*, for example, represents shirking. As a result, one can envision such a situation of imperfect congruence between the Court and S.G. However, excessive shirking is contrary to the best

¹ The relationship between the Supreme Court and federal Circuit Courts has previously illustrated such a theoretical framework in judicial politics (Songer et al. 1994).

interests of the Court and therefore likely to inspire punishment. In essence, the Court should accept some degree of political advocacy, but will react negatively once it reaches a certain tipping point. This threshold represents the excessive shirking, or political advocacy, likely to inspire punishment. Overall, a faithful agent fulfills the informational needs of the principal. In response, the agent receives support and influence from the Court members. Alternatively, a solicitor general who shirks excessively hinders the work of the Court thereby jeopardizing the influence and success rooted in the principal-agent relationship. For the purposes of this study, politicization represents the excessive shirking that should lead to decreased success on the merits.

I employ two basic model types in this study, a time series and individual-level analysis. I construct measures of success and politicization based on the ideological directions of all *amici* filings during the observed time period.² For the time series regression, S.G. success is the dependent variable with *politicization* as the main predictor, and the Court term as the time element. I control for the ideological tenor of the justices with a variable, *justice support*, representing the number of sitting justices sharing the ideological predisposition of the President in office.³ I utilize a lagged dependent variable model to measure the dynamic effect of politicization on S.G. success. For the individual-level analysis, I implement a logit regression predicting S.G. success. Here, the main predictor is

² *Amici* are chosen rather than cases where the S.G. (and U.S. government) was a litigant because they offer the best lens from which to view the solicitor general's true preferences. The discretionary nature of *amici* enables a more accurate analysis of S.G. influence and success. The S.G. does not control the decision to appeal all lower court decisions. Also, one cannot be as confident, in cases where the government is a litigant, if the justices are ruling in favor of the S.G. and the information being provided or just the federal government in general.

³ I also substituted two variables controlling for the justices' ideology, including the median justice ideology using the Segal and Cover (1989) scores, as well as the number of sitting justices sharing the ideological predisposition of the appointing President. All three control variables were substituted in all models, time series and individual case analysis, and all results remained virtually identical.

again *politicization* with an added dummy variable for *amici* contradicting the ideological predisposition of the S.G., based on the partisan affiliation of the President in office.

In addition, the individual-level analysis includes split-samples of the S.G. advocating for the petitioner versus the respondent, Court terms 1953-1980 versus post-1980 terms, and political issue salience within the selected time periods.⁴ A split-sample of the solicitor general advocating for the petitioner versus respondent should reveal any systematic differences in the way the Court views the role of the S.G. when attempting to overturn or affirm lower court decisions. This is especially appealing given the fact that the Court grants *certiorari* to a majority of cases with an eye to overturn. The split-sample for time period should reveal any systematic changes evident from the beginning of the Reagan Administration. Within this last division, the sample is split once again based upon political issue salience.⁵ A Court cognizant of its public appearance and support does not want to exude an image of decision-making based on purely political or ideological considerations (Scheb, II and Lyons 2001). Therefore, increased S.G. politicization should further inhibit success in salient cases. The same control variable used in the aggregate analysis is also implemented in the logit regression. I expect a negative relationship between success and *politicization* in both analyses, thus supporting the theory that the Court is less likely to adopt positions advocated by the S.G. when the office is exhibiting excessive political advocacy.

⁴ Split samples are used instead of dummy interactions because of skewed distributions for many of the dummy variables that would create severe multicollinearity problems, and the lack of intuitive appeal in attempting to center the dummy variables involved in the interactions.

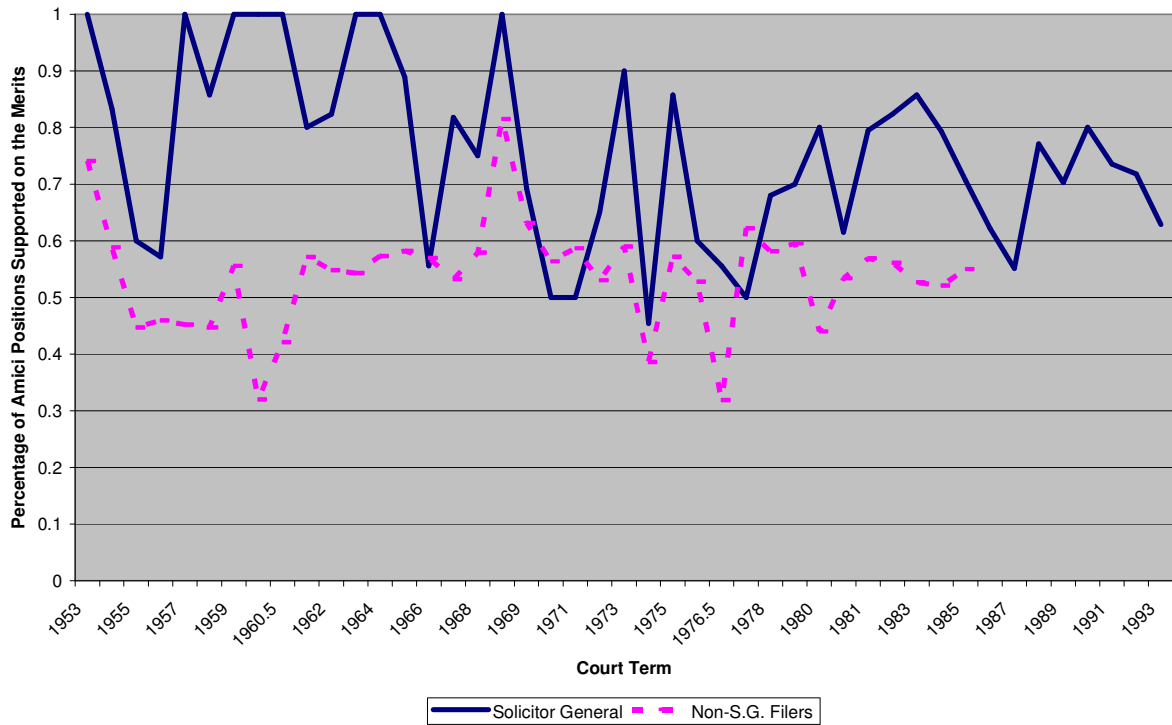
⁵ Salient cases are identified as having been on the front page of the *NY Times* or on the *CQ List* of significant cases. Case salience data was provided by Epstein and Segal (2000).

Data and Methodology

The data for the time series regression consist of all *amici curiae* filed during Supreme Court terms 1953 through 1985, and the individual-level analysis includes all S.G. *amici* from the 1953 to 1993 terms.⁶ The unit of analysis is the individual case or docket number in which the Supreme Court granted *certiorari* and proceeded with formal action. I dropped all cases where the S.G.'s position or the Court's judgment was not clearly distinguishable in the *U.S. Reports*. In order to create the measures described below, I identified when the S.G. filed an *amicus* brief, whether it supported the petitioner or the respondent, and whether it advocated a liberal or a conservative position. I utilize only S.G. *amici* for all measures except the dependent variable in the time series analysis, which compares the S.G.'s success to all other *amici* filers. In that case, I followed the same procedure outlined above for non-S.G. *amici*. Figure 1 illustrates the S.G.'s influence from 1953-1993 compared to all other actors. Most notably, both series are stationary with the S.G. experiencing consistently higher *amici* success than all other filers.

⁶ I used data on the SG *amicus* briefs from 1953-1993 that have been employed to study the influence of the office's filings (Segal 1988). These data are made available on Jeffrey Segal's web site (www.sunysb.edu/polsci/jsegal). All non-S.G. briefs were obtained from the Phase II database, Gibson (1997). All other case data needed in the paper were obtained from the Spaeth "AllCourt" database (www.as.uky.edu/polisci/ulmerproject/sctdata.htm).

Figure 1: Success Rate as Amicus Curiae, 1953-1993



Time Series Model

To test my expectation that politicization negatively affects S.G. success on the merits, I construct a dependent variable for each Court term between 1953 and 1985 based on the difference in success between the solicitor general and all other *amici* filers. This measure is grouped by the party advocated in the brief and weighted by the percentage of S.G. briefs supporting a particular party in that given term. In other words, I compute the difference between the S.G.'s success rate when supporting the petitioner and that of all non-S.G. filers supporting the petitioner. This number is then weighted by the percentage of all S.G. *amici* during the given term advocating the petitioner's position. I then repeat this procedure for the respondent case and compute the sum to obtain a single measure of

solicitor general success.⁷ Thus, a larger value of the dependent variable denotes increased success compared to all other actors. The main predictor, *politicization*, is measured using the percentage of all S.G. *amici* for each term advocating the ideological predisposition of the President in office.⁸ I construct one measure for an entire term in order to assess the general sense of the S.G.’s political advocacy. Therefore, a higher value of *politicization* signifies more political advocacy by the solicitor general’s office. Figure 2 presents the longitudinal representation of *politicization*. The main control variable, *justice support*, measures the number of sitting justices sharing the ideological predisposition of the President in office. This control accounts for the Court’s proclivity to rule in favor of the S.G. based solely on an ideological affinity for the administration. Overall, the unit of analysis, or time construct, is the Court term. I therefore create a value for each variable corresponding to each term.

Individual-Level Analysis

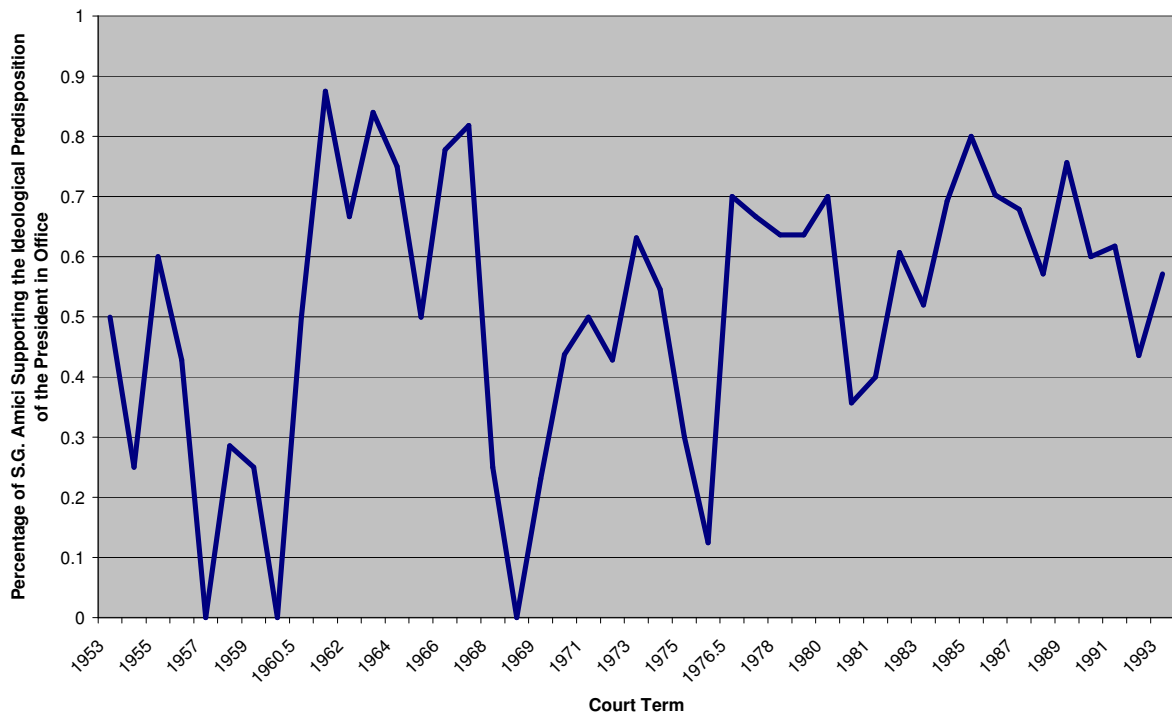
I implement a logit regression of all solicitor general *amici* from terms 1953-1993. The dependent variable is the dichotomous choice of whether the Supreme Court decision on the merits supported the position advocated by the solicitor general in the *amicus* brief. I coded a “1” if the Supreme Court supported the S.G.’s position and “0” if not. The main

⁷ S.G. success = $[(\% \text{ of wins when S.G. supports petitioner}) - (\% \text{ of wins of non-S.G. briefs when supporting petitioner})] * (\% \text{ of all S.G. amici supporting petitioner}) + [(\% \text{ of wins when S.G. supports respondent}) - (\% \text{ of wins of non-S.G. briefs when supporting respondent})] * (\% \text{ of all S.G. amici supporting respondent})]$

⁸ Since all data and analyses are grouped by Court term, I create two separate observations for terms where the party of the President (and thus the ideological predisposition) changed – 1960, 1968, 1976, 1980, and 1992 (1992 just for the individual-level analysis). In other words, I compute two measures of the dependent variable in the time series analysis and two measures of the politicization variable for both analyses. I use the ideology of the President in office corresponding to the date of oral argument and before, as well as the likelihood of filing a brief. For example, if in term 1960 the oral argument date for a particular case was prior to 1961, then the ideological direction of the brief is compared to that of Eisenhower while after the turn of the year 1961 it is compared to Kennedy. If any case had more than one oral argument date, I use the last oral argument date as the pertinent one.

predictor, *politicization*, is the same measure described in the aggregate analysis. A second predictor, *contradiction*, is a dummy variable indicating an *amicus* brief advocating an ideological direction contrary to the sitting President's predisposition. Here, a "1" was coded for those briefs signifying an ideological contradiction and "0" if not. The *justice support* control variable is also the same as used in the aggregate analysis. Separate regression equations are estimated for each split-sample outlined above.

Figure 2: Politicization of Solicitor General Amici



Results

Table 1 reports the results of the lagged dependent variable time series model. For the observed time period, the effect of *politicization* on S.G. success is in fact negative and statistically significant.⁹ As the solicitor general exhibits increased political advocacy, success on the merits decreases compared to all other *amici* filers. In addition, the lagged dependent variable coefficient is positive and significant. While not the theoretical focus of this analysis, this result confirms the idea of a dynamic relationship involving S.G. success. The solicitor general's success rate across administrations is, in part, dependent on the previous year due to the established, deep-rooted nature of the S.G.'s influence on the Court.

Table 1: Lagged Dependent Variable Model of S.G. Success as *Amicus Curiae*, 1953 – 1985

Predictor	Coefficient	T-Statistic
S.G. Success Rate – First	.383**	2.47
Lag (t-1)	(.155)	
Politicization	-.233*	-1.96
	(.119)	
Justice Support	.013	0.41
	(.031)	
Constant	.179	1.21
	(.149)	
R ²	0.24	

Notes: Table entries are OLS coefficients with estimated standard errors in parentheses. *p<.05, **p<.01 (one-tailed); N = 36.

⁹ The result of a basic bivariate t-test confirms that the means of S.G. success and *politicization* are significantly different from each other.

Overall, this analysis suggests that the Court does indeed alter its perception of the S.G., and the information contained within the briefs, based upon the general ideological tenor of *politicization*.¹⁰ This result holds even after controlling for the number of sitting justices each term who are predisposed to support the White House's agenda.

Table 2 presents the results for the individual-level logit analysis grouped by advocated party. Additionally, Table 3 displays the odds-ratio coefficients associated with the results in the previous table. The estimated coefficients for all cases grouped together show no support for my hypothesis. The *politicization* predictor is in the expected direction but not statistically significant. In addition, the *contradiction* predictor is not significant but the *justice support* is positive and significant. As a result, for all S.G. *amici* between 1953 and 1993, *politicization* appears to have no effect while the justice control variable demonstrates the expected result that more members of the Court ideologically predisposed to support the President increases the probability of S.G. success. However, implementing a split-sample of the S.G. advocating for the petitioner versus the respondent reveals a much different picture. Here, *politicization* is strongly negative when the brief advocates for the petitioner yet positive when supporting the respondent. Both results are statistically significant. The petitioner group demonstrates the expected relationship between political advocacy and success. This result is even more compelling when considering the Court naturally seeks to reverse cases and the S.G. has been more successful over time when supporting the petitioner (Segal and Reedy 1988; Segal 1988). Therefore, in cases where the

¹⁰ It should be noted that the aggregate measures for the earlier portion of the time period are not as precise as the end of the series due to differences in *amici* participation. For much of the 1950's and some of the 1960's, frequencies of *amici* filings were considerably smaller, thus resulting in aggregate measures for each Court term based on much smaller numbers than later in the series.

S.G. consciously pursues a reversal of a lower court decision and is traditionally much more successful at doing so compared to affirmances, the solicitor general is less likely to win as *politicization* increases, by a factor of 0.80. However, *amici* advocating for the respondent yields the opposite conclusion. Whereas *politicization* diminishes success when supporting reversals, it enhances justices' support of the S.G. when seeking affirmances. This result suggests that perhaps Court members view the S.G.'s role differently based on the litigant. Furthermore, the effect of *politicization* on S.G. support is conditional on the party supported in the brief.¹¹

Table 2: Probability of the Court Supporting the S.G.'s Position as *Amicus Curiae* on the Merits, 1953-1993 by Advocated Party

Predictor	All Cases	Petitioner	Respondent
Politicization	-.251 (.526)	-1.56* (.743)	1.63* (.871)
<i>Amici</i> Contradiction	.057 (.179)	-.054 (.250)	.331 (.268)
Justice Support	.136** (.052)	.163* (.076)	.076 (.073)
Constant	.534 ⁺ (.385)	1.56** (.552)	-.883 ⁺ (.607)
Log Likelihood	-439.86	-246.46	-177.43
Pseudo-R ²	.01	.02	.02
N	774	500	274

Notes: Table entries are MLE logit coefficients with estimated standard errors in parentheses. ⁺p<.10, *p<.05, **p<.01 (one-tailed).

¹¹ The McKelvey and Zavoina pseudo-R² for all cases is .013, .029 for the petitioner group, and .028 for the respondent sample.

Table 3: Odds Ratios of the Court Supporting the S.G.’s Position as *Amicus Curiae* on the Merits, 1953-1993 by Advocated Party

Predictor	All Cases	Petitioner	Respondent
Politicization	.778	.210*	5.09*
<i>Amici</i> Contradiction	1.06	.947	1.39
Justice Support	1.15**	1.18*	1.08
N	774	500	274

Notes: Table entries are odds-ratio coefficients with estimated standard errors in parentheses. * $p < .05$, ** $p < .01$ (one-tailed).

Tables 4 and 5 report the logit coefficients and odds ratios, respectively, for the split-sample grouped by time period. For all terms between 1953 and 1980, no effect of *politicization* is evident. Similarly, both the *contradiction* predictor and justice control variable are positive and statistically significant. This comports with the findings of Bailey et al. (2005) who argue that ideological signals contrary to the S.G.’s predisposition are more likely to be accepted by individual justices. However, when examining the time period beginning with the Reagan Administration, political advocacy does in fact exhibit a significantly negative impact on success. For these cases, the S.G., by a factor of 0.85, is less likely to win on the merits as *politicization* increases. In addition, *contradiction* yields a significant negative result while the justice control demonstrates a positive coefficient. Overall, these data suggest a possible transformation in the treatment of the solicitor general’s office, similar to qualitative descriptions of the Reagan Administration’s political

use of the S.G. The probability of success decreases substantially, starting with Reagan's tenure, when the solicitor general's office exhibits more political advocacy.¹²

Table 4: Probability of the Court Supporting the S.G.'s Position as *Amicus Curiae* on the Merits, 1953-1993 by Time Period

Predictor	All Cases	Post-1980 Terms	1953-1980 Terms
Politicization	-.251 (.526)	-1.96* (1.12)	.367 (.690)
<i>Amici</i> Contradiction	.057 (.179)	-.414* (.233)	.706** (.284)
Justice Support	.136** (.052)	.097* (.057)	.439** (.149)
Constant	.534 ⁺ (.385)	1.96** (.740)	-1.39* (.685)
Log Likelihood	-439.86	-241.05	-190.56
Pseudo-R ²	.01	.02	.04
N	774	427	347

Notes: Table entries are MLE logit coefficients with estimated standard errors in parentheses. ⁺p<.10, *p<.05, **p<.01 (one-tailed).

Table 5: Odds Ratios of the Court Supporting the S.G.'s Position as *Amicus Curiae* on the Merits, 1953-1993 by Time Period

Predictor	All Cases	Post-1980 Terms	1953-1980 Terms
Politicization	.778	.141*	1.44
<i>Amici</i> Contradiction	1.06	.661*	2.03**
Justice Support	1.15**	1.10*	1.55**
N	774	427	347

Notes: Table entries are odds-ratio coefficients with estimated standard errors in parentheses. *p<.05, **p<.01 (one-tailed).

¹² The McKelvey and Zavoina pseudo-R² for all cases is .013, .027 for post-1980 terms, and .075 for 1953-1980 terms.

Tables 6 and 7 present the regression results, logit estimates and odds ratios, of the final individual-level split-sample analysis distinguishing between politically salient and non-salient cases. Much like the previous analysis, there is no effect of *politicization* on S.G. success between 1953 and 1980. In fact, the only significant effects are the positive coefficients for the justice control variable for both salient and non-salient cases, as well as the *contradiction* predictor for non-salient cases. Again, S.G. success is strongly related to Court members' political affiliation and when a brief is filed contrary to the S.G.'s ideological predisposition. However, the time period starting with the 1981 term reveals a significant negative relationship between political advocacy and success in salient cases. The S.G. is less likely to win on the merits of salient cases as *politicization* increases, by a factor of 1.00. No effect is evident in non-salient cases beginning with the Reagan era.¹³ These results are consistent with the notion that the Court wishes to retain an apolitical image (Scheb, II and Lyons 2001). If the S.G. is exhibiting more political advocacy in a given term, then the Court is less likely to support the solicitor general's position when more eyes are watching. This suggests that the Court, starting with the Reagan Administration, was perhaps more sensitive about its image and less inclined to support the political agenda advocated by the S.G. Likewise, these results are consistent with the view that the solicitor general's office excessively attempted to advance Reagan's political agenda through the Court.

¹³ The McKelvey and Zavoina pseudo- R^2 for post-1980 term salient cases is .137, .048 for post-1980 non-salient cases, .152 for 1953-1980 salient cases, and .051 for 1953-1980 non-salient cases.

Table 6: Probability of the Court Supporting the S.G.'s Position as *Amicus Curiae* on the Merits, 1953-1993 by Time Period and Political Issue Salience

Predictor	Post-1980 Terms		1953-1980 Terms	
	Salient	Non-Salient	Salient	Non-Salient
Politicization	-7.66** (2.87)	-.596 (1.28)	.702 (1.25)	.088 (.837)
<i>Amici</i> Contradiction	-.031 (.574)	-.760** (.274)	.693 (.557)	.693* (.333)
Justice Support	.148 ⁺ (.114)	.087 (.069)	.677* (.301)	.322* (.175)
Constant	4.26** (1.76)	1.61* (.863)	-2.53* (1.33)	-.775 (.823)
Log-Likelihood	-51.51	-173.40	-52.65	-136.83
Pseudo-R ²	.08	.03	.08	.03
N	81	346	108	239

Notes: Table entries are MLE logit coefficients with estimated standard errors in parentheses. ⁺p<.10, *p<.05, **p<.01 (one-tailed).

Table 7: Odds Ratios of the Court Supporting the S.G.'s Position as *Amicus Curiae* on the Merits, 1953-1993 by Time Period and Political Issue Salience

Predictor	Post-1980 Terms		1953-1980 Terms	
	Salient	Non-Salient	Salient	Non-Salient
Politicization	.000**	.551	2.02	1.09
<i>Amici</i> Contradiction	.969	.467**	2.00	2.00*
Justice Support	1.16 ⁺	1.09	1.97*	1.38*
N	81	346	108	239

Notes: Table entries are odds-ratio coefficients with estimated standard errors in parentheses. ⁺p<.10, *p<.05, **p<.01 (one-tailed).

Discussion / Conclusion

The solicitor general is firmly established as the most influential actor external to the Court. Although scholars have produced various explanations for this disproportionate success, previous studies have largely neglected the relationship and implications involving both perspectives. I propose a theory of solicitor general success contending that the office's political advocacy directly influences this success. If the S.G. is considered both an independent agent cognizant of the Court's best legal interests yet at the same time functions as a political extension of the executive, a tension exists among the explanations for S.G. influence. From a principal-agent perspective, a S.G. who shirks excessively in advocating the President's ideological agenda should be punished by the Court and experience decreased support on the merits. The results of this study suggest a conditional relationship between solicitor general success and politicization. The effect of political advocacy on S.G. success depends on the party supported in *amici*, the time period under investigation, and political issue salience. More specifically, politicization negatively influences solicitor general success when supporting the petitioner, in cases following the 1980 Court term, and in politically salient cases beginning with the Reagan Administration.

Based on this research, further investigation is necessary to explain the contextual circumstances surrounding how the Court views the S.G.'s proper role. Do the justices view the role of the S.G. differently when advocating for the petitioner versus the respondent, as these results seem to indicate? Did the heightened sense of political advocacy starting with the Reagan era fundamentally alter the solicitor general's status on the Court and deteriorate a perceived independent status? To be sure, this study reflects merely a starting point in

examining the interaction between the S.G.'s two conceived roles. However, politicization does appear to jeopardize the solicitor general's unique status among Court members and advantages compared to other litigants and *amici* contributors. Given that the S.G. is the federal government's chief litigator on the Supreme Court, it is important to understand the factors affecting the office's influence. Additionally, possible effects involving the politicization of the solicitor general's office possess important implications for the study of inter-branch relations and our governmental system of shared powers as a whole.

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